Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Annual Assessment of the Status of	)	
Competition in the Market for the	)	MB Docket No. 05-255
Delivery of Video Programming	)	

REPLY COMMENTS OF

THE UNITED STATES TELECOM ASSOCIATION

ON THE

NOTICE OF INQUIRY

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Summary of Reply Comments

The record established in the comments filed in this docket is clear on three key points: (1) wireline video competition, although currently uncommon, will not only benefit consumers of video services, but, more generally encourage and accelerate broadband deployment—a primary goal of the Commission, and an important national goal; (2) the franchise process, and build-out requirements in particular, delay and deter wireline video entry and investment when applied to new entrants; and (3) competitively neutral access to programming is essential.

The Commission should do all that it can to encourage wireline video entry and competition as this will facilitate faster and greater broadband deployment, and it will bring additional benefits to customers in the form of a greater array of services and lower prices. For that reason alone, competitive wireline video entry is part of our national broadband policy and, therefore, must not subjected to franchise rules and build-out requirements, which delay and deter wireline video competition. This cannot possibly be consistent with the framework of the Telecommunications Act of 1996, which removes barriers to entry and promotes the deployment of advanced telecommunications networks. Moreover, fairness actually requires that LEC video offerings not be subjected to franchise and build-out regulations historically imposed on incumbent cable operators, just as cable operators voice offerings are not subjected to the panoply of regulations imposed on the ILECs.

An examination of competitive developments in markets where cable systems do face competition from wireline video providers confirms the absence of true competitive constraints on cable system conduct generally. Most cable systems do not have to contend with wireline video service offerings; where they do, however, they respond with lower rates and better services. This is persuasively demonstrated by the examples of several USTelecom members.

Most notably, it is apparent that LEC entrants must overcome significant barriers to entry, which means that there undoubtedly would be many more examples of LEC entry and growing wireline video competition but for the persistent barriers to entry enjoyed by cable operators.

Therefore, the Commission should work aggressively to ensure that the franchise process, and build-out requirements in particular, are not applied to wireline video entry. What the cable operators call a "level playing field" is, in fact, sharply tilted in favor of incumbent cable operators, thereby deterring and delaying entry. Moreover, the Commission should also work to ensure that competitors can obtain competitively neutral access to programming.

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The record established in the comments filed in this docket is clear on three key points: (1) wireline video competition, although currently uncommon, will not only benefit consumers of video services, but, more generally encourage and accelerate broadband deployment and benefit consumers; (2) the franchise process, and build-out requirements in particular, delay and deter wireline video entry and investment when applied to new entrants; and (3) competitively neutral access to programming is essential. USTelecom respectfully submits these Reply Comments to supplement the record on these points and to offer a number of examples of the benefits of competition from local exchange carrier (LEC) entry into markets for the delivery of video programming.

I. WIRELINE VIDEO COMPETITION WILL BRING BROADBAND TO CUSTOMERS FASTER AND MORE UBIQUITOUSLY, WITH BUNDLES OFFERING GREAT SERVICES, AND LOWER PRICES

The evidence in the record uniformly supports the proposition that broadband deployment—a primary goal of the Commission, and an important national goal—will be facilitated by ensuring that companies investing in broadband networks are able to offer video programming services over their networks. For that reason alone, competitive wireline video entry should not be dictated by, and limited to, the geographic contours of current franchised

cable networks, as such constraints inevitably will delay and deter broadband deployment. Instead, new entrant network owners should be free to deploy broadband video wherever they have networks, and as business conditions dictate. This is how a market economy operates, and there is no reason to think that a command-oriented economy will do better than market competition at bringing broadband to the American public.

Wireline video competition from LEC entry will also benefit consumers who purchase video but not broadband services. Cable operators argue in their comments that they face widespread competition, and they imply that additional competition is unnecessary. To the contrary, it is well established that competition from wireline video providers, such as LECs, would brings additional benefits to consumers.[1] An examination of competitive developments in markets where cable systems do face competition from wireline video providers confirms the absence of true competitive constraints on cable system conduct generally. Most cable systems do not have to contend with wireline video service offerings; where they do, however, they respond with lower rates and better services. This is persuasively demonstrated by the examples of several USTelecom members, which are described below.

The Commission and some parties in this docket, such as NCTA, noted the emerging video competition from large LECs, such as BellSouth, SBC, and Verizon. Each of those companies (all of which are USTelecom members) filed comments that, among other things,

[1] *E.g.*, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 03-172, Tenth Annual Report, 19 FCC Rcd 1606 ¶ 11 (2004);United States General Accountability Office (GAO), *Report to the Chairman, Comm. on Commerce, Science, and Transportation, U.S. Senate: Telecommunications, Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, GAO-04-8, at 20 (Oct. 2003); GAO, *Report to the Subcomm. on Antitrust, Competition Policy, and Consumer Rights, Comm. on the Judiciary, U.S. Senate: Telecommunications, Wire-Based Competition Benefited Consumers in Selected Markets,* GAO-04-241,at 12 (Feb. 2004).

described its video plans and offerings. They are not the only LECs seeking facing obstacles in entering and competing in video distribution markets, however. In fact, the Commission may be able to draw some lessons from the experiences of other LECs that have already rolled out video programming services over their networks. Most notably, it is apparent that LEC entrants must overcome significant barriers to entry, which means that there undoubtedly would be many more examples of LEC entry and growing wireline video competition but for the persistent barriers to entry enjoyed by cable operators. With this in mind, USTelecom offers the following descriptions of the experience of five USTelecom members.

CC Communications. CC Communications is in Fallon, Nevada, which is about 60 miles from Reno and Carson City, Nevada. CC Communications was founded in 1889, and it currently serves approximately 14,000 telephone access lines. CC Communications added video to its service offerings in 2002, and it actually offers its video services further into the rural parts of the franchise area than does the local cable operator, which is not required to serve customers if such service would necessitate extension of the cable system more than 1320 feet. CC Communications entered the market without being subject to franchise obligations and build-out requirements, but it was required by subsequent legislation to obtain a franchise license for its existing operations.

CC Communications has had success with its video offering; in fact more than half of the subscribers making the video choice for the first time (e.g., when they move into a new subdivision) choose CC Communications as their video provider. They are receiving up to 130 channels of all-digital programming delivered over phone lines using ADSL2+ and Fiber to the Home. In fact, CC Communications's state-of-the-art network was used for pre-commercial testing of products used to deliver video over DSL—innovation is not limited to large

telecommunications companies. The incumbent cable operator, Charter Communications, responded to CC Communications's entry by lowering its rates, in contrast to the general trend of cable rate increases in recent years, and by upgrading its network in Fallon before it did so on its larger system close to Reno, Nevada, where it does not face wireline video competition.

CC Communications is facing a significant issue with discriminatory access to programming. While Charter is not required to provide encryption for digital programming on its basic tier (which all subscribers receive), CC Communications is being asked to do so, for example, by Turner Broadcasting, which is affiliated with a fellow cable operator. There does not appear to be a reasonable business justification for this disparity; Turner asserts that it simply requires encryption for all programming delivered over DSL, which adds considerable expense for LEC entrants.

CC Communications has also experienced difficulties obtaining Video on Demand content due to encryption issues. While CC Communications understands the need for security and the protection of intellectual property in the VoD context, content owners have yet to make decisions or provide clear guidance about the security measures they will require for DSL delivery. Consequently, some wireline video competitors, such as CC Communications, are faced with the choice of either not having the content they need to compete fully with cable operators, which do not face the same issues, or investing in costly encryption technology and potentially still not receiving the content.

Champaign Telephone Company. Champaign Telephone Company is based in Urbana, Ohio, which is about 50 miles from Columbus, Ohio and 50 miles from Dayton, Ohio. Champaign was founded in 1928, and it serves approximately 11,500 access lines. Champaign

started offering video programming services in 2002, both separately and in bundles with voice and broadband data services, in Urbana, Ohio and West Liberty, Ohio.

Champaign obtained franchises in both cities, which are actually smaller than its existing networks in the two areas. Moreover, it was feasible for Champaign to add video to its entire networks in both cases from the outset because they are relatively small networks and few upgrades were necessary. In fact, like CC Communications, Champaign actually serves a greater area than does the incumbent cable operator—Time Warner—in West Liberty. Champaign provides its video services using VDSL and its growth compares favorably with the growth rates of other facilities-based competitors in cable markets. Champaign is building on this success by investing in a fiber-to-the-home (FTTH) network.

Champaign has faced significant issues with program access. Champaign turned to the Headend-In-The-Sky (HITS) service when it first sought video programming as HITS offers an attractive wholesale bundle of programming. HITS simply refused to sell to Champaign because it is not an incumbent franchised cable operator. Consequently, Champaign was denied this benefit provided to incumbent cable operators even though it is required to comply with incumbent cable regulation, thereby increasing the asymmetry created by imposing franchise regulation on LEC entrants while the cable operator is not subjected to incumbent LEC regulation. Champaign purchases programming though the National Cable Telecommunications Cooperative (NCTC) and, like CC Communications, it is facing the additional cost of having to provide encryption for basic-tier digital programming, unlike Time Warner.

Consolidated Communications. Consolidated Communications is based in Mattoon, Illinois, which is in the east central part of the state, where its network passes approximately 46,000 homes. Consolidated was founded in 1894, and it has grown into a family of companies

providing voice and data communications services to both business and residential customers including local and long distance, Internet, business systems, retail and wholesale operator services, public services and fully integrated telemarketing and fulfillment services. Consolidated has additional ILEC operations in western Illinois and Texas.

Consolidated launched video service using VDSL over its network in eastern Illinois in the second quarter of 2005, and its launch has proven to be successful. Consolidated is providing service to well over 1000 customers after just a few months, and many more have signed up for service. Consolidated delivers its broadband service at speeds of up to 20 Megabits per Second over distances of up to 6000 feet, allowing customers to receive video delivered using Internet Protocol (IPTV) on three televisions simultaneously. The local cable competitor has responded by offering several free months of service, lowering its prices, and increasing its telephone service deployment.

Consolidated's network happens to cover more territory than the local cable network, and it was economically feasible to add video over most of the network at the outset. Therefore, Consolidated was able to meet the requirement of the cable franchise process and build-out requirements in Mattoon. Similar franchise and build-out requirements have slowed Consolidated's deployment in Texas, however, where there is less congruence between Consolidated's networks and cable franchise boundaries. Consolidated believes that the statewide franchising regime adopted in recent legislation will accelerate its video deployment.

HickoryTech. HickoryTech is based in Mankato, Minnesota, which is about 75 miles from Minneapolis, Minnesota. HickoryTech was founded in 1898, and it serves approximately 71,000 access lines. HickoryTech has been offering digital television since 2001, first in St. Peter, Minnesota, and now in Ellendale (July 2005), New Richland (July 2005), St. Clair (as the

incumbent LEC, September 2005), and Waseca (July 2004) as well. HickoryTech expended an average of six months and at least 300 hours of work to obtain approval on each of its franchise applications despite the fact that they were not contested. Moreover, HickoryTech has not yet added video service on some of its existing LEC networks because it would be required to build capital-intensive network extensions (in competition with another LEC) just to obtain the right to offer video service to its customers within its current service area. This is so because the cable franchise areas, like many in this country, are not congruent with LEC networks. Moreover, HickoryTech is forced to forego the opportunity to serve customers on the edges of its networks because they are just over the line of demarcation for neighboring franchise territories.

HickoryTech first entered St. Peter as a competitor for all services, including telecommunications services, and this entry was facilitated by the ability to offer video. HickoryTech uses VDSL to deliver all-digital programming, serving between 40-200 customers per "node" on its fiber-to-the-curb (FTTC) architecture. Each customer can use up to three televisions simultaneously, with 127 basic and a maximum of 190 channels of video, music, and pay-per-view programming. More than 45% of the households in the St. Peter community have chosen HickoryTech. This occurred even though approximately 30% of television households in the area were subscribing to DBS services at the time HickoryTech entered the market. In response to HickoryTech's video success, the incumbent cable operator in St. Peter (MediaComm) upgraded its network to add digital television and cable modem services, and it reduced prices by 15%-20% on average.

HickoryTech's early success in St. Peter has been echoed in other markets, demonstrating further the customer benefits from wireline video competition. HickoryTech also has 14% of the market already after just over a year in Waseca. Residents in St. Clair have responded with

enthusiasm, with around 40% of the households having already placed orders with HickoryTech after just two months of commercial operation.

SureWest. SureWest Communications, based in Roseville, California, not only provides video services to customers in its incumbent territory, but offers its fiber-to-the-premises network of triple-play services to over 80,000 households. SureWest has been providing video to its customers since 2002,[2] and video was an integral part of its broadband deployment plans. SureWest is providing video programming today using Internet Protocol Television (IPTV), which it started to use commercially in 2004.[3] Unfortunately, SureWest has elected to not pursue franchises in certain adjacent areas because of burdensome uneconomical build-out requirements, while its cable company competitors do not face similar restrictions when deciding to add voice services in competition with SureWest.

SureWest offers over 260 channels, including more than 150 channels on digital choice, more than 75 premium multiplex channels including HBO, Showtime, Starz and more, 28 channels of international programming from around the world, live pay per view events and packages, more than 400 hours of pay-per-view programming per month (with unlimited viewing with a 24-hour window, and full VCR functionality). SureWest has over 20,000 video subscribers on its "fiber" platform, giving it 21% penetration. Those subscribers have directly benefited from wireline video competition by a wider variety of offerings, services, and reduced cable rate increases. Similarly, subscribers remaining with the incumbent cable operators have

[2] SureWest Communications, Presentation at 3rd Annual Jefferies Communications and Media Conference Webcast, at 7 (Sep. 20, 2005) (available at http://www.surw.com/ir/analyst/jcmc092005/?page=7).

[3] *Id.* at 6 (available at http://www.surw.com/ir/analyst/jcmc092005/?page=6).

benefited as well because those cable competitors have accelerated their network upgrades and responded with their own competitive pricing initiatives.

II. BROADBAND VIDEO DEPLOYMENT WILL BE DELAYED IF ENTRANTS MUST OBTAIN FRANCHISES AND, IN PARTICULAR, IF ENTRANTS ARE FORCED TO BUILD OUT TO MATCH CABLE SYSTEM FOOTPRINTS.

Cable operators can freely compete with "triple play" offerings by entering telecommunications markets and deploying voice communications services to customers without facing regulatory barriers to entry. These cable operators are fighting, however, to deny the same opportunity to competitors as they are arguing vociferously for regulatory barriers to entry in video markets in the form of franchise requirements, particularly build-out obligations. In particular, NCTA argues that build-out requirements are necessary to ensure that competition is not "artificially skewed by rules and regulations that unfairly give some competitors an unfair advantage over others."[4]

Far from being fair, or serving as a "level playing field," the imposition of cable franchise regulations, and build-out requirements in particular, on video entrants would delay and deter entry. Such requirements are not imposed on competitors in other markets, notably markets for offering voice communications services in competition with incumbent LECs. Instead, new voice competitors, including cable operators, are not subjected to regulations historically imposed on the ILECs when they offer services in competition with ILECs. Therefore, cable operators are not subject to barriers to entry when competing with LECs offering telecommunications services. Indeed, cable operators cannot be subjected to build-out requirements requiring them to provide telephone service throughout a LEC study area, or to all

[4] NCTA Comments, at 17.

types of customers.[5] Moreover, cable operators that provide service using Internet Protocol do not even have to obtain statewide certification, much less 1000s of local licenses, each of which imposes different, and sometimes conflicting, requirements. Consequently, fairness actually requires that LECs must be similarly free from barriers to entry, particularly build-out requirements, when entering markets for the distribution of video programming.

Even if NCTA's arguments made sense for video programming (and they don't), they definitely do not make sense for broadband deployment, which increasingly will be encouraged by video programming service packages. As USTelecom explained in its Comments, broadband deployment will occur faster and more ubiquitously when video programming services are included in the bundle of services available over broadband facilities. Therefore, needless regulatory requirements and barriers to entry that delay and deter wireline video competition will also inhibit broadband deployment. This cannot possibly be consistent with the framework of the Telecommunications Act of 1996, which removes barriers to entry and promotes the deployment of advanced telecommunications networks. Accordingly, our national broadband policy must not superseded by build-out requirements and franchise rules.

It is more than economically irrational to require entrants to precisely match the incumbents' network footprints just to compete; it is also fundamentally unfair. Logically, NCTA's argument that cable franchise build-out requirements should apply to competitors,[6] means that every potential broadband service provider other than a franchised cable operator must comply with many different, and often competing, regulatory demands for investment and

[5] *In the Matter of The Public Utility Commission of Texas*, CCB Dkt. No. 96-13, Memorandum Opinion and Order, 13 FCC Rcd 3460 ¶ 13 (1997); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002).

[6] NCTA Comments, at 16-24.

upgrades, including network extensions outside its current service area, if it wishes to offer the full suite of broadband services over its existing network. Cable operators, on the other hand, are free to offer the full suite of broadband services anywhere they choose without complying with any regulatory demands for investment and upgrades, much less any network extensions. Simply put, NCTA's proposition would be an absurd rule that could not rationally be defended as a method for promoting broadband deployment.

NCTA's argument that our patchwork quilt of cable network footprints ought to be the roadmap defining future construction and upgrading of advanced telecommunications networks would be quickly recognized as an absurd proposition if it were made in any sector of our economy. It strains the imagination to think that prospective competitors to WalMart, Home Depot, Safeway, or McDonald's would be required before opening their first store to commit to building many such stores covering entire cities or states just to gain the right to test their concept in the first location. Moreover, cable franchise authorities are not permitted to require satellite video service providers to offer service to every household within the footprint of the incumbent cable operator (there are a number of homes that cannot receive DBS service in nearly every franchise area in the country). It is even more important that such build-out requirements do not prevent broadband deployment.

Ironically, build-out requirements are even more illogical when applied to LEC entry in video markets because LEC networks: (a) offer the best chance for ubiquitous wired competition for video and broadband; and (b) are MORE universal than are cable networks. The supposed universal availability objective advanced by NCTA is not well served by forcing the existing LECs to extend their networks, and overlap other LEC networks, in order to match a different patchwork set of cable network footprints. Instead, we should encourage network owners to *add*

video services to their existing networks as technology and market conditions allow. In sum, we are more likely to achieve ubiquitous broadband competition, in furtherance of national broadband policy, by removing regulatory barriers to adding video services to existing networks rather than by imposing cable build-out requirements.

Build-out requirements are not even necessary to encourage LECs to offer video programming services in low-income or high-cost areas. Indeed, LEC networks already serve low-income and high-cost areas—virtually every low-income and high-cost household in America can receive local and long distance telephone services over a LEC network. Given that low-income households purchase video programming services at roughly the same rate as households at other income levels,[7] LECs have little incentive to avoid offering video services over their existing networks in low-income areas. Instead, build-out requirements would actually *create* new disincentives for LECs to offer video service in such areas by requiring the LECs to engage in capital-intensive network extensions outside their current service territories (in competition with other LECs) as a condition of providing video service in the low-income and high-cost areas where they already provide telecommunications and information services. Therefore, the principal effect of build-out requirements would not be to encourage additional video competition in low-income and high-cost areas but, rather, to *discourage* video competition everywhere.

In fact, by denying LECs the right to add video services on their existing networks, cable franchise authorities are actually denying video competition to subscribers *outside* their jurisdiction. Business and fairness considerations will sometimes lead a LEC to treat all of its

[7] *See, e.g.*, R. Kieschnick and B.D. McCullough, *Why Do People Not Subscribe to Cable Television: A Review of the Evidence,* Presented at the Telecommunications Policy Research Conference (1998) (available at: http://www.tprc.org/abstracts98/kieschnick.pdf).

customers the same when offering video programming rather than offering video to only some of the customers on its network. If a LEC chooses to treat all of its customers the same for video services, however, it often will have to comply with different, even conflicting requirements imposed by cable franchise authorities. It may even be required to undertake massive capital construction to extend network beyond its current service area just to match the footprint of a cable system that competes with part of its network. These potentially conflicting and disproportionate demands will lead some LECs to forego offering video services altogether, thereby denying video service even to customers that are outside the relevant franchise area.

III. BROADBAND NETWORK OWNERS WILL BE ABLE TO INVEST MORE QUICKLY IN THEIR NETWORKS WITH COMPETITIVELY NEUTRAL ACCESS TO PROGRAMMING

The Commission should conclude from the Comments filed in this docket that program access will remain competitively significant over the coming years, and it may even increase in importance. Entrants and competitors report problems and concerns about future access to competitively important programming. Some of these issues have been identified by the Commission; others may be comparatively new. In both cases, however, it is clear that video programming is an important input for broadband deployment, and that broadband investment will be facilitated by ensuring competitive access to most popular programming content.

It is important that the Commission strive to ensure that wireline video competitors can achieve competitively neutral access to programming. History has shown that program access is vital for competitive entry.[8] In particular, the Commission should not allow the program access rules to be circumvented by technological changes, such as terrestrial distribution of video.

[8] *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, 9 FCC Rcd 7442, 7513-14 ¶ 231 (1994); NCTA, *Legislative Issues in Focus: Effective Competition to Cable* (Jan. 1995) ("the program access provisions of the 1992 Cable

IV. CONCLUSION

The Commission should do all that it can to encourage wireline video entry and competition as this will facilitate faster and greater broadband deployment, and it will bring additional benefits to customers in the form of a greater array of services and lower prices. Therefore, the Commission should work aggressively to ensure that the franchise process, and build-out requirements in particular, are not applied to wireline video entry. What the cable operators call a "level playing field" is, in fact, sharply tilted in favor of incumbent cable operators, thereby deterring and delaying entry. Moreover, the Commission should also work to ensure that competitors can obtain competitively neutral access to programming.

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Act, . . . have firmly established the ability of alternative providers to compete in the market for cable tv."); Eric Schine, "Digital TV: Advantage, Hughes," *Business Week*, Mar. 13, 1995, at 66, 67 (James Ramo, DirecTV's marketing head, stated, "without [program access,] we would have been dead.").